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Supreme Court, U.S.
FILED
NOV 18 2002
CLERK

No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Petitioner State Farm Mutual Automobile Insurance Company was set forth on page ii of Petitioner's Opening Brief, and there are no amendments to that statement.

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ARGUMENT

Plaintiffs mischaracterize State Farm's arguments on appeal as requesting a rigid ratio rule for punitive damage awards and seeking the "manufacture" of federal constitutional rules of evidence regarding "other acts" and "relevance." State Farm seeks no such rules. Indeed, this Court's pronouncements regarding proportionality and the proscription against punishment of extraterritorial conduct are more than sufficient to compel reversal of the constitutionally impermissible punitive damage award in this case.

Even if State Farm's handling of Mr. Campbell's auto accident case could be characterized as worthy of punishment, it cannot be rhetorically reconfigured to fit within some so-called reprehensible nationwide profit scheme -- unless, of course, that scheme is defined, as it was by the Utah Supreme Court, so broadly and so generally as to include every act of alleged misconduct undertaken by an insurance company's personnel in the handling and processing of tens of millions of insurance claims nationwide over a period of two decades. The plain fact is that the basis for the Utah Supreme Court's reinstatement of the enormous punitive award was a litany of allegedly "egregious and malicious" conduct that not only was not directed in any sense at Mr. Campbell, but that occurred primarily outside the state of Utah. Depicting State Farm's handling of Mr. Campbell's lawsuit as part of some "clandestine incentive scheme" "to shore up the bottom line" and "boost profits" does not mean that a court in Utah can, consistent with constitutional principles of due process, punish State Farm for every other so-called wrongful act that plaintiffs can find and the Utah Supreme Court can characterize as motivated by a corporate goal of enhancing profits.

The Utah Supreme Court's decision leaves no doubt but that State Farm was not punished in this case just for its handling of Mr. Campbell's auto accident case; rather, it was bludgeoned with $145 million in punitive damages for all manner of claims practices nationwide that were sensationally detailed in the Utah Supreme Court's opinion as deceitful efforts to meet pre-set financial goals. The punitive award ought not stand: it is grossly disproportionate to the harm suffered by the Campbells and Utah's interest in punishing State Farm's conduct toward the Campbells, and is unconstitution-

ally excessive under this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I. The Utah Supreme Court's Reinstatement of the $145 Million Punitive Award Unconstitutionally Punishes Out-of-State and Dissimilar Conduct

Plaintiffs attempt to persuade this Court that nothing in the Utah Supreme Court's opinion suggests that the Court was punishing out-of-state conduct and that State Farm has selected "snippets" from the Court's opinion. Resp. Br. at 32. In fact, the Utah Supreme Court's opinion repeatedly singles out conduct that indisputably occurred out of state to justify the punitive award in this case. For example, the Utah Supreme Court repeatedly cites as deserving punishment alleged acts of discrimination by State Farm against "vulnerable" groups. Pet. at 18a-19a, 20a, 34a. The record shows that the purported acts of discrimination were found in the testimony of plaintiffs' witnesses Ina DeLong and Bruce Davis, who testified that in California and Colorado State Farm discriminates in its claims handling against policyholders who are young, elderly, newlyweds, poor, women, minorities, and other "vulnerable" groups. JA 992-94, 1018-20, 1023, 1100-01. To give another example, the Court singles out as warranting punishment State Farm's investigation in California of DeLong's relationship with a contractor (Pet. 19a), an investigation that indisputably had no connection with Utah or this litigation. JA 1108-09, 1163-64, 1168.

The Utah Supreme Court's identification of conduct that it deems particularly worthy of a $145 million punitive award cannot be dismissed as mere "snippets." Indeed, throughout its opinion the Court makes clear that it is punishing State Farm not only for its treatment of the Campbells but for its alleged nationwide PP&R scheme (Pet. 6a, 18a, 20a, 22a, 43a) or what the Court terms State Farm's "consistent way of doing business for the last twenty years, directed specifically at some of society's most vulnerable groups." Pet. 34a. Plaintiffs now attempt to redefine the PP&R scheme punished by the Utah Supreme Court as a scheme having nothing to do with all the various practices that the Court identified as "part and parcel" of that scheme. *See* Pet. 37a, 39a. Plaintiffs seek to persuade this Court that the PP&R scheme defined by the Utah Supreme Court in discussing evidentiary issues in this

case (*see id.*) is an entirely different PP&R scheme from the one to which the Court points as meriting extraordinary punitive damages. Resp. Br. at 34. Contrary to plaintiffs (*id.* at 34-35), State Farm has not "conflat[ed]" two different legal issues or put "words into the Utah court's mouth." The question is what the Utah Supreme Court meant when it referred to State Farm's PP&R scheme. The Court's own discussion shows that it meant all the varied, dissimilar practices it lists as comprising that "scheme," including first-party property claims practices (such as appearance allowances), predictable experts, hard ball litigation tactics, first-contact settlements, and discrimination. Pet. 37a, 39a. Plaintiffs do not dispute that the evidence concerning these practices was substantially based upon conduct occurring outside the borders of Utah.

Plaintiffs mischaracterize State Farm's argument as a "suggestion that this Court manufacture a federal constitutional law of 'other acts' and 'relevance.'" Resp. Br. at 41. Contrary to plaintiffs, the issue on this appeal is the unconstitutional use the Utah Supreme Court made of evidence of out-of-state and dissimilar conduct as the basis for reinstating the $145 million punitive award. For example, the constitutional propriety of the Utah Supreme Court's having punished State Farm for its investigation of Ina DeLong (as it explicitly did) is not an evidentiary issue. Moreover, contrary to plaintiffs, the constitutionality of the punishment imposed upon State Farm does not depend on whether the evidence of that investigation was admitted on plaintiffs' redirect examination of DeLong or whether State Farm (as plaintiffs claim) "opened the door" to it. The question is whether punishment of that California conduct, and all the other out-of-state, lawful, and dissimilar conduct in this case, was within the scope of Utah's legitimate interest in punishment and deterrence – which it clearly was not.

In any event, plaintiffs' contention that most of their evidence of out-of-state and dissimilar conduct was admitted as rebuttal or impeachment evidence is incorrect. There can be no dispute that plaintiffs' whole strategy regarding punitive damages was to introduce as much evidence as they could of conduct outside Utah. Plaintiffs in their case-in-chief had their "fact" witness Ina DeLong testify extensively about the handling of homeowners' earthquake damage claims, first-

party auto claims, and other first-party claims practices in California. JA 1082-1106, 1165-73. Likewise, plaintiffs' "fact" witness Bruce Davis testified at length regarding appearance allowances and other first-party claims practices in Colorado. JA 986-1035. Neither Davis nor DeLong were involved in State Farm's treatment of the Campbells, and their only testimony about the Campbell case was that they knew little or nothing about it. JA 1047-50, 1111, 1149.

Similarly, as the Utah Supreme Court itself noted, the trial court allowed plaintiffs to introduce "extensive expert testimony" regarding State Farm's "nation-wide operations" in order to "prove the existence" of the PP&R scheme. Pet. 6a. Such expert evidence included the testimony by plaintiffs' experts Prater and Fye regarding State Farm's practices and conduct nationwide and mainly in states other than Utah. As plaintiffs' expert Prater explained to the jury, "this case is . . . about State Farm's pattern and practices nationwide. . . . The case is [about] more than what happened in Utah, is my point. That's why I'm here talking about all this other stuff." JA 2391. Likewise, plaintiffs' expert Fye testified that no other trial he had been involved in had "the extent and scope of evidence regarding State Farm's wrongful practices throughout the country than this case, here before this jury." JA 1521. The fact that State Farm attempted, after objecting, to respond to this improperly admitted evidence and that even more such improper evidence was admitted on redirect or for impeachment does not excuse the unconstitutionality of the grossly excessive punitive award. All of this evidence is the direct result of plaintiffs' strategy of using this individual Utah trial as a forum for punishing State Farm, unconstitutionally, for twenty years of allegedly wrongful conduct nationwide.

In attempting to establish that there was no punishment of out-of-state conduct in this case, plaintiffs rarely cite to the record but rather rely extensively upon the opinion of the Utah trial court. Plaintiffs quote the trial court's opinion as authority for the proposition that "'the Campbells never requested the jury to use this proceeding to punish State Farm for bad acts occurring outside of Utah.'" Resp. Br. at 35 (quoting Pet. 104a). On the contrary, as the record shows, plaintiffs' counsel in his opening statement did exactly that: he asked the jury to punish State Farm "for what it's doing across the country,

which is the purpose of punitive damages." JA 242.

The trial court's clearly erroneous finding that "the Campbells never requested the jury to use this proceeding to punish State Farm for bad acts occurring outside of Utah" was adopted verbatim from plaintiffs' proposed findings. *See* Pet. 104a; R.9923 ¶ 13 (left-hand column) (L.671). Indeed, the trial court's opinion was adopted largely verbatim from plaintiffs' proposed findings.[1] In turn, in its review of the punitive award, the Utah Supreme Court by and large adopted and relied upon the trial court's findings. *See, e.g.*, Pet. 13a, 17a, 18a, 24a, 35a.[2] The required *de novo* review of a constitutional challenge to punitive damages does not permit the degree of deference accorded here by the Utah Supreme Court to the Utah trial court. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-42 (2001) (an analysis of constitutionality of punitive award based upon "improper predicate[s]" and "questionable conclusions" cannot "survive *de novo* review"); *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable").

In addition to minimizing the vast amount of evidence of out-of-state and dissimilar conduct, plaintiffs also attempt to manufacture similarities between State Farm's purported practices in other states and State Farm's conduct toward the Campbells. Most egregiously, plaintiffs now attempt to claim

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[1] Plaintiffs' proposed findings, which were submitted more than a year and a half after the trial, are reproduced in State Farm's Lodging ("L") on pages 667-733 in the left-hand column.

[2] This Court has noted "the potential for overreaching and exaggeration on the part of attorneys" in preparing findings of fact and criticized the practice of lower courts' adopting findings prepared by a prevailing party, as occurred here. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985); *see also United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 & n.4 (1964) (trial judges should "'avoid as far as [they] possibly can simply signing what some lawyer puts under [their] nose. These lawyers . . . are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case'") (citation omitted). Indeed, State Farm objected to plaintiffs' proposed findings, *inter alia*, as "overly partisan and adversarial in both tone and substance." L.667.

that the Campbells were somehow the victims of discrimination because they were a "vulnerable" "retired couple" and that therefore the Utah Supreme Court was not punishing out-of-state conduct when it punished alleged discriminatory conduct by State Farm. Resp. Br. at 33. In fact, at the time of the car accident, Mr. Campbell was 63 and not retired and Mrs. Campbell was 50 and not retired. JA 747-48, 792-93; R.10265:174; R.10312:26. And although the State Farm adjuster who handled the Campbell case, Ray Summers, testified as a plaintiffs' witness, he never in his testimony stated or suggested that the Campbells were discriminated against or targeted because they were elderly or vulnerable or for any other reason. Plaintiffs provide no citation to the record or the opinions below in support of their new assertion that the Campbells were discriminated against, and in fact, there is no support of any kind for that assertion.

Indeed, there was very little evidence of misconduct in Utah and, contrary to the Utah courts, no evidence that the purported PP&R scheme affected vast numbers of Utah consumers. Plaintiffs' list of twenty-one witnesses who they claim testified as to the effect of the PP&R scheme on Utah consumers (Resp. Br. at 36 n.23) demonstrates the lack of substantiation for plaintiffs' assertions that "vast" numbers of Utah consumers were "threatened." That list includes such persons as the Campbells themselves, the injured driver, Campbell relatives, the parents of Todd Ospital (who was killed in the car accident allegedly caused by Mr. Campbell), and the Cache County court clerk, all of whose testimony had nothing whatsoever to do with the purported "PP&R scheme."[3] Plaintiffs even include in this list their witness, Samantha Bird, a former State Farm claims adjuster and superintendent in Utah from 1980 to 1992, whose testimony in fact debunked the whole notion of a "scheme" in Utah. Ms. Bird testified that she was not trained to discriminate, to mis-

[3] Plaintiffs' list also includes Brent Hoggan and Miles Jensen, the lawyers retained by the Campbells after the verdict against Mr. Campbell, Bill Lithgow, the Farmers' insurance claims adjustor whose report stated that Todd Ospital was speeding and on the way to see his girlfriend (L.1048-49), and Paul Brenkman, an Allstate claims manager who handled the other policy covering the Ospital car. Resp. Br. at 36 n.23.

represent facts or to undervalue claims, that average paid cost goals were never put into her PP&R forms, and that as far as she was concerned, average paid costs were irrelevant to the way she handled her job. JA 465-70. She also testified that compensation was not based on average paid costs, that she was taught to pay what was owed and handle each claim on its merits, and that people she supervised followed the same practice. *Id.*; JA 434, 475, 482-85.

There was *no* testimony or other evidence of any kind that factually linked the alleged PP&R scheme to State Farm's decision to try the third-party claims against Mr. Campbell rather than settle them. Plaintiffs theorize that State Farm's purported "'profit and evasions schemes'" were tied to the Campbell case because such schemes permitted State Farm "'to engage in a gamble in which the Campbells (unwittingly) had all the downside risk and State Farm had all the potential upside gain.'" Resp. Br. at 43 (quoting Pet. 114a, 132a). This theory that State Farm has an incentive to "roll the dice" by going to trial rather than settling third-party claims is belied by "the reality that an insurer which unreasonably refuses a settlement offer may be held liable for the entire amount of a judgment entered against the covered party." *Builders Square, Inc. v. Saraco*, No. 94-4116, 1997 WL 3205, at *6 (E.D. Pa. Jan. 7, 1997) (rejecting the plaintiff's theory that "the excess verdict potential gave [the insurer] an incentive to take a chance on a trial"), *aff'd mem.*, 135 F.3d 763 (3d Cir. 1997). Moreover, in many states, as in Utah, an insurer also faces the risk of substantial emotional distress and other consequential damages in excess of policy limits for an unreasonable failure to settle third-party claims. *See* John H. Bauman, *Emotional Distress Damages & the Tort of Insurance Bad Faith*, 46 Drake L. Rev. 717, 719 (1998). Thus, plaintiffs' assertion that State Farm's decision to try Mr. Campbell's case was part of a "clandestine incentive scheme" to maximize profits and underpay claims defies common sense. Trying the third-party claims against Mr. Campbell was neither clandestine nor profit-making, nor part of a "scheme" to underpay insureds' claims. The Utah courts' conclusory statements that the Campbell case was somehow tied to the alleged PP&R "scheme" are the very kind of "improper predicate[s]" and "questionable conclusions" that this Court rejected in *Cooper*.

See Cooper, 532 U.S. at 441-42.[4]

Plaintiffs improperly look to the consideration of prior out-of-state conduct in criminal sentencing proceedings as justification for Utah's punishment of out-of-state and dissimilar conduct in this civil case. *See* Resp. Br. at 30. The two contexts are not analogous. In a criminal sentencing, a court may look to other conduct to select a penalty within the range set by statute for the crime of which the defendant has been convicted. *See Apprendi v. New Jersey*, 530 U.S. 466, 481-84 (2000) (in imposing a sentence "within the range prescribed by statute" a judge may exercise discretion in considering various factors relating both to offense and offender). Unlike some states, Utah has not set a statutory range for punitive damages. Rather, it allows a jury unfettered discretion in selecting the amount of a punitive award. The consideration of out-of-state conduct in this case did not result in the Utah courts or jury merely selecting a higher or lower punitive award within the permissible range for the conduct directed towards the plaintiffs. Rather, the Utah Supreme Court punished State Farm for a whole array of nationwide conduct over twenty years that was dissimilar to State Farm's decision to litigate the third-party claims against Mr. Campbell, rather than settle within policy limits. That punishment is not supported by plaintiffs' attempted analogies to criminal sentencing and indeed is in direct violation of this Court's decision in

[4] Plaintiffs erroneously contend that there is no difference between the alleged bad faith failure to settle the third-party claims against Mr. Campbell and all the claims handling practices that purportedly made up the PP&R scheme because a "dollar of profit" is a "dollar of profit." Resp. Br. at 45. Plaintiffs' rationale would in every circumstance serve to lump all of a corporation's business practices together in a "scheme," for purposes of permitting plaintiffs to garner huge punitive damages awards. Moreover, despite plaintiffs' claims of huge profits generated by the alleged PP&R scheme, the evidence at trial showed that State Farm in fact incurred underwriting losses in the years at issue. Pet. Br. at 25 n.23. In addition, plaintiffs failed to show that the practices allegedly comprising the PP&R scheme – such as the use of appearance allowances, specification of non-OEM or salvage parts, and deductions for depreciation and/ or betterment – were unlawful in any state. Contrary to plaintiffs (Resp. Br. at 48), the fact that such lawful practices (*see* Pet. Br. at 20-22) may reduce the cost of claims payments does not render the practices unlawful or part of a scheme. Nor did plaintiffs show that the use of average-paid-claims goals in personnel forms was unlawful in any state.

BMW and State Farm's due process rights.

II. The Utah Supreme Court Fundamentally Misapplied the *BMW* Guideposts

A. Ratio. As plaintiffs' counsel, Laurence Tribe, stated in his post-trial arguments before the Utah trial court, the ratio of punitive damages to compensatory damages in this case is 145 to 1. R. 10293:231, 235; L. 920, 924. Plaintiffs now contend that the ratio here is "at most 70:1." Resp. Br. at 17. That contention is contrary to the rulings of the Utah Supreme Court and the trial court. Both of those courts treated the relevant compensatory damages in this case as $1 million (Pet. 144a, 27a n.9), thus producing a ratio of 145 to 1.

Plaintiffs set up a straw man by asserting that State Farm seeks a "rigid ratio rule." Resp. Br. at 14. State Farm acknowledged in its opening brief that this Court has declined to draw a "mathematical bright line" to define the constitutional outer limit of an acceptable ratio. Pet. Br. at 29. At the same time, this Court has stated that a ratio of 4 to 1 is "'close to the line'" in terms of constitutional propriety. *BMW*, 517 U.S. at 581 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)). Here, whether the judgment reinstated by the Utah Supreme Court is described as 145 to 1 or as 70 to 1, it is in either event exceedingly far over that line.[5]

Plaintiffs' attempts to justify the ratio are all based on the erroneous notion that the function of a punitive award is to punish any and all conduct ever allegedly engaged in by a corporate defendant as long as plaintiffs claim that the conduct is all part of some amorphous "scheme." Plaintiffs' approach is antithetical to the purpose of the ratio guidepost, which constrains punitive damages by focusing the punitive damages

[5] Plaintiffs cite a number of cases that stand for the proposition that where compensatory damages are nominal or small, a higher ratio is permissible. Resp. Br. at 14 n.2 & 15; *see, e.g.*, *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919) (upholding statutory civil penalty of $75 in case in which plaintiff's actual damages were $0.66); *Barry v. Edmunds*, 116 U.S. 550, 564 (1886) (noting case with high ratio where "actual and mere pecuniary loss did not amount to . . . $20"); *New Orleans, Jackson, & Great Northern R. R. v. Hurst*, 36 Miss. 660, 665, 669 (1859) ($4,500 punitive award where plaintiff suffered negligible harm). Such cases have no relevance here, where the compensatory award is a million dollars.

inquiry on the harm to the plaintiff. *See BMW*, 517 U.S. at 580; *Cooper*, 532 U.S. at 440. Plaintiffs' own contentions as to State Farm's allegedly long-term profit-making scheme show how little relationship the $145 million punitive award had to the conduct actually at issue in this case, the failure to settle the third-party claims against Mr. Campbell.

Plaintiffs assert that the Utah courts correctly concluded that the extreme ratio in this case is justified because the "'probability of recurrence of State Farm's misconduct appears extremely high.'" Resp. Br. at 20 (quoting Pet. 24a, 142a). It is unrebutted, however, that the Campbell case was the only one in Utah in which an insured was exposed to the possibility of execution on an excess verdict after State Farm decided to try the case, rather than settle within policy limits.[6]

Plaintiffs also defend the ratio in this case by pointing to the purported unlikelihood that State Farm will be punished for its conduct. Resp. Br. at 23-24. Plaintiffs rely upon the "fact," incorrectly attributed by the Utah Supreme Court to the trial court's decision, that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability." Pet. 30a; *see also* Pet. 34a. That purported 1-in-50,000 figure was derived by plaintiffs from Ina DeLong's testimony regarding the number of first-party claimants who complain or go to trial and the purported use of those numbers in State Farm employee training in California. JA 1103-04. That testimony had nothing to do with Utah, excess verdicts in third-party

[6] Plaintiffs contend that the "paucity of documented cases like the Campbells' . . . underscores the need for more severe punishment." Resp. Br. at 45. Contrary to what plaintiffs imply, the number of cases in Utah was accurately established by a state-wide search carried out by State Farm at the trial court's order for records and documents regarding such cases. *See* Pet. Br. at 35 n.33. The rarity of such cases is supported by the testimony of plaintiffs' witness Samantha Bird, a former State Farm claims superintendent in Utah, that neither she nor anyone she supervised had *ever* had a trial result in a verdict higher than State Farm's highest settlement offer. JA 472-73. As State Farm's regional vice president, Buck Moskalski, testified, State Farm does not keep a file of bad faith/excess verdict cases because each such case is dealt with as it comes up and there are so few such cases that there is no business purpose for keeping a separate file on them. JA 1852-53.

cases, or this case, and the 1-in-50,000 figure is not found in the trial court's opinion.[7] *See* Pet. Br. at 30-31. Plaintiffs now maintain that a "substantial downward revision of the 1-in-50,000 figure" would still justify the punitive award in this case and present an entirely new analysis, with no basis in the evidence, using numbers pulled out of the air. Resp. Br. at 24-25. In fact, based upon the testimony of plaintiffs' expert Gary Fye, the likelihood for an insurance company to be sued for bad faith after an excess verdict is close to 100%, and deterrence is optimal without punitive damages. *See* Pet. Br. at 31-32 & n.30.

In attempting to justify the extreme ratio in this case, plaintiffs and the Utah Supreme Court also incorrectly point to the $100 million in punitive damages awarded by a Texas jury. Resp. Br. at 17-18; Pet. 17a, 30a, 34a. That award was never entered by the Texas trial court and never binding on State Farm, and the first-party claims asserted in that case for underinsured motorist coverage had no similarity to the Campbell case. *See* Pet. Br. at 11, 32-33. Moreover, the Utah Supreme Court's statement (Pet. 17a) that "State Farm's corporate headquarters had never learned of" the Texas punitive award is incorrect. In fact, the $100 million punitive award in the Texas case – which was settled for "pennies on the dollar" – was known to Manuel Mendoza, an in-house attorney in State Farm's General Claims Department at its corporate headquarters, who oversaw Texas claims handling matters. JA 845-48, 1798, 1356, 1416, 1488, 1493, 1526, 2827-28.

[7] Plaintiffs do not (and cannot) dispute that *no* Utah witness testified that his or her "employee training" included being instructed that he or she could get away with cheating policyholders, based on plaintiffs' 1-in-50,000 figure or anything remotely similar. Contrary to plaintiffs' contention (Resp. Br. at 24 n. 10), State Farm objected before the trial court to plaintiffs' proposed finding regarding the 1-in-50,000 figure. R.9941; L.689. The trial court's rejection of this proposed finding was one of the limited alterations made by the trial court to plaintiffs' proposed findings, which the trial court otherwise adopted largely verbatim. *See supra* at 5. Professors Shavell and Polinsky point out in their *amicus* brief that the 1-in-50,000 figure is incorrect because it would include many State Farm policyholders whose complaints were satisfactorily addressed by State Farm. *See* Brief *Amicus Curiae* A. Mitchell Polinsky, Steven Shavell and Citizens for a Sound Economy Foundation in Support of Petitioner, at 16-17 & n.8.

In sum, the 145 to 1 ratio in this case demonstrates the lack of proportionality between the punitive award and the harm to the Campbells. The ratio is symptomatic of the larger error in the Utah Supreme Court's decision, namely its punishment of a whole range of dissimilar, lawful, and extraterritorial conduct not at issue in plaintiffs' claims against State Farm.

B. Reprehensibility. Plaintiffs fail to address the fact that the Utah Supreme Court's discussion of the alleged "reprehensibility" of State Farm's conduct was, in large part, a discussion of the reprehensibility of the purported twenty-year scheme of nationwide practices that were dissimilar to State Farm's failure to settle the third-party claims against Mr. Campbell. The Court did not consider such dissimilar and out-of-state conduct to assist in its evaluation of the reprehensibility of State Farm's conduct toward the Campbells. Rather, the Court evaluated the reprehensibility of and punished the purported twenty-year nationwide scheme. The Court's misapplication of the reprehensibility guidepost demonstrates the unconstitutional reach of the punitive award.

In defense of the Utah Supreme Court's reprehensibility analysis, plaintiffs improperly (i) seize on the Court's limited references to conduct in Utah, (ii) invoke at length the findings of the trial court (substantially authored by plaintiffs' counsel), and (iii) simply disregard the Court's extensive reliance upon dissimilar and extraterritorial conduct. Thus, plaintiffs make no mention of the fact that the Utah Supreme Court's discussion of reprehensibility singled out State Farm's investigation of Ina DeLong in California; State Farm's purported discrimination against the "vulnerable," which was shown not through any Utah testimony, but through the testimony of DeLong and Bruce Davis regarding purported conduct in California and Colorado; and an instruction manual purportedly "mandating" State Farm's attorneys to "ask personal questions" of claimants (although there was no evidence that improper personal questions were asked of the Campbells or any other State Farm claimant in Utah). Pet. 18a-19a, 29a.

Plaintiffs erroneously contend that the entire twenty-year range of conduct in this case, which included such varied practices as appearance allowances, the use of IME doctors, and the specification of non-OEM and salvage parts, was less

"disconnected" than the conduct considered in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). Resp. Br. at 38. The conduct at issue in the slander of title claim in *TXO* was TXO's attempt to obtain oil and gas from the other party's land without paying royalties. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 875-77 (W. Va. 1992). All the other conduct considered involved substantially similar attempts by TXO to obtain oil and gas from other people's land without paying royalties. *Id.* at 881-82. As this Court made clear, the conduct in *TXO* consisted of "*similar* nefarious activities in [TXO's] business dealings." *TXO*, 509 U.S. at 450-51 (emphasis added); *see also BMW*, 517 U.S. at 563-64, 577-78 (considering substantially identical failures by BMW to disclose pre-sale repairs); *Haslip*, 499 U.S. at 14 (noting that defendant's agent "was engaged in a pattern of fraud *identical* to those perpetrated against respondents") (emphasis added).

State Farm's conduct toward the Campbells had nothing in common with the purported acts of discrimination in Colorado and California, the investigation of Ina DeLong's relationship with a contractor, appearance allowances, specification of non-OEM parts, asking personal questions (if indeed any were ever asked anywhere), or the host of other alleged practices about which plaintiffs elicited extensive testimony in this case. Nothing in *TXO* or the other authorities cited by plaintiffs (Resp. Br. 37-38) supports the consideration of this vast amount of evidence of dissimilar and unrelated conduct for any purpose in a punitive damages inquiry.

The reprehensibility of a defendant's conduct does not allow a court to jettison the principle of proportionality. Nor is it a court's task to inquire into a defendant's general or "institutional" reprehensibility. Rather, "the existence and frequency of *similar* past conduct," *TXO*, 509 U.S. at 462 n.28 (emphasis added), might heighten the reprehensibility of the defendant's conduct toward the plaintiff and thus justify imposing punitive damages at the higher end of the constitutionally permissible range of ratios. Even the existence of *similar* past conduct does not authorize a penalty that is beyond the permissible range of ratios altogether.

In the present case, *no* instances of similar conduct exist.

As discussed in State Farm's opening brief (at 35 & n.33), the Campbell case was the only known excess verdict case in Utah in which a State Farm policyholder was faced with the possibility of execution on an excess verdict after State Farm declined an offer to settle within policy limits.[8] Moreover, State Farm regional vice-president Buck Moskalski testified that in retrospect things should have been done differently in the Campbell case and that in subsequent cases he had taken steps to ensure that State Farm recognized that "[w]hen we evaluate a case, and we determine it's one that needs to be tried, we recognize that there's certain consequences that go with that. . . . And that stepping forward and paying those judgments when we've guessed wrong is just an acceptance of those consequences and taking care of our policyholders." JA 1852. Thus, the Campbell case came to the attention of the relevant decision-maker even before the award of punitive damages, and he took steps to insure that no other policyholder in Utah would be exposed to the possibility of execution on an excess verdict. *See BMW*, 517 U.S. at 565-66 (noting that "[b]efore the judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States"); *see also Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir. 1999) (punitive award should "attract the attention of whoever is in charge of the corporation's daily decisions" and "bear heavily upon regional or local managers").

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[8] Plaintiffs offer pure speculation as to State Farm "insureds having to endure the trauma of trial as a result of the company's unreasonable rejection of settlement offers" "even in cases that did not lead to excess verdicts." Resp. Br. at 44. No showing was made that any State Farm insureds suffered such trauma. In any event, where State Farm's rejection of a settlement offer does not lead to an excess verdict, that rejection cannot be characterized as unreasonable and no cause of action is possible. Moreover, where State Farm has promptly paid the excess verdict or otherwise settled a case so that a policyholder has not faced personal liability on the excess verdict, State Farm's conduct is not wrongful. *See, e.g., Talmadge v. State Farm Mut. Auto. Ins. Co.*, No. 96-8044, 1997 WL 73476, at *3, 107 F.3d 21 (10th Cir. 1997) (Table) (where State Farm assured policyholder before and after verdict that it would pay any excess judgment and promptly settled case and paid entire settlement amount, policyholder had no bad faith claim against State Farm and could not recover for "emotional trauma she suffered by sitting through a trial").

Plaintiffs attempt to cast doubt upon State Farm's policy of assuring policyholders that where State Farm has opted to go to trial instead of accepting a settlement offer within policy limits, State Farm will pay any subsequent excess verdict. *See* Resp. Br. at 19-20. This policy was reflected in the unrebutted testimony of Mr. Moskalski (JA 1854, 1890) and in the peace of mind letters submitted with State Farm's petition for rehearing to the Utah Supreme Court (which letters were not stricken and are part of the record in this case). *See* L. 599-607. This policy is also reflected in the Utah Supreme Court's opinion in *Green v. Louder*, 29 P.3d 638, 642, 648-49 (Utah 2001), in which the court specifically referenced such a letter provided by State Farm when it decided to litigate the third-party claims asserted against its insured in that case.[9]

Due process mandates that the reprehensibility analysis focus on the defendant's conduct toward the plaintiff. *See BMW*, 517 U.S. at 575-76; *Cooper* 532 U.S. at 440-41. Vast amounts of evidence of dissimilar and out-of-state conduct did not assist the evaluation of State Farm's treatment of the Campbells. The conclusory contentions by plaintiffs and by the Utah courts that the Campbells' case was somehow linked to "State Farm's overall profit scheme" (Resp. Br. at 43) should not be allowed to disguise what is evident from the Utah courts' opinions and from respondents' brief – namely, that State Farm was unconstitutionally punished for alleged conduct that was extraterritorial and dissimilar and had nothing to do with the Campbells.

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[9] Plaintiffs contend that "the Utah manager [as plaintiffs term Mr. Moskalski] admitted that in *none* of the past Utah cases involving excess verdicts did the insureds 'get any peace of mind letters.'" Resp. Br. at 19 n.7. As Mr. Moskalski's testimony made clear, those other Utah cases were before the trial of this case and before his decision to institute a formal policy of sending "peace of mind" letters. JA 1891-92. In none of those cases was the insured subject to the possibility of execution on the excess verdict. JA 291-96, 1851-53, 1891. Plaintiffs also point to an affidavit from an attorney in Alaska, outside Mr. Moskalski's Mountain States Region, R.9520-21, and to a 1998 case in which there had at that time been no decision to go to trial, as well as their Objection to State Farm's Petition for Rehearing before the Utah Supreme Court and unsubstantiated allegations in a complaint that they attached to that Objection. Resp. Br. at 19 n.7. That Objection and its attachments were not permitted under Utah R. App. 35(a) and are not part of the record in this case.

C. Comparable Penalties. Plaintiffs conclusorily contend that the relevant conduct under the third *BMW* guidepost is not the defendant's conduct toward the plaintiffs, but rather the alleged twenty-year scheme of dissimilar and unrelated conduct that plaintiffs assert existed. *See* Resp. Br. at 25-26. This contention, urged by plaintiffs and adopted by the Utah Supreme Court, improperly transforms the third guidepost from a constraining force on the amount of a punitive damages award to a license for huge punitive exactions. It is clear from this Court's decision in *BMW* that the "comparable conduct" to which the courts must look in applying the third guidepost is conduct comparable to the defendant's conduct toward the plaintiffs. *See* Pet. Br. at 38-39. Here, the penalty for such comparable conduct would be a single $10,000 fine under the Utah Unfair Claims Practices Act. *See id.*

Plaintiffs contend that this Court may not review the Utah courts' interpretation of Utah law as to the available penalties. Resp. Br. at 25. Clearly, plaintiffs are in error: this Court in *BMW*, 517 U.S. at 584, reviewed the comparable penalties available under state law in that case. Moreover, plaintiffs here apparently recognize that a "confidence game," the conduct specified in subsection ppp of the Utah Pattern of Unlawful Activity Act, Utah Code Ann. § 76-10-1602(4)(ppp) (cited as the relevant statute by the Utah courts), is not relevant comparable conduct. Thus, plaintiffs themselves now point to other provisions of Utah law, not considered by the Utah courts, for this Court's consideration.

Plaintiffs suggest that relevant conduct under the Utah Pattern of Unlawful Activity Act would be "theft by deception" (subsection (v)), referencing offenses under Utah Code Ann. § 76-6-405, or "deceptive business practices" (subsection (bb)), referencing offenses under Utah Code Ann. § 76-6-507, or federal mail and wire fraud (subsection cccc). *See* Resp. Br. at 26 n.12. The conduct proscribed by these statutes, however, is not remotely comparable to the conduct at issue in this case. Section 76-6-405 defines "theft by deception" as "obtain[ing] or exercis[ing] control over property of another by deception and with a purpose to deprive him thereof." Section 76-6-507 criminalizes the deceptive business practices of using false weights or measures in the purchase or sale of commodities and selling or offering to sell adulterated or mislabeled commodities. *See* Utah Code. Ann. § 76-6-507. These provisions clearly have no bearing on the amount of punitive damages permissible in this case. Finally, plaintiffs do not identify any conduct in this case that could conceivably constitute federal mail or wire fraud.

Plaintiffs also persist in incorrectly stating that Utah Code Ann. § 76-3-303 would provide for imprisonment in this case. *See* Resp. Br. at 26. As discussed in State Farm's opening brief (at 39-40), that sentencing provision does not authorize imprisonment at all. It provides that when an executive is convicted of an offense committed in furtherance of the affairs of the corporation, the court may issue an order disqualifying him from exercising his executive functions for up to five years. *See* Utah Code Ann.§ 76-3-303(2). Contrary to plaintiffs, this is not a question of the interpretation of state law. The Utah Supreme Court was simply wrong in concluding that the non-existent possibility of imprisonment under this statute was "an extremely important consideration" (Pet. 35a) justifying the massive punitive award against State Farm.

Plaintiffs incorrectly contend that State Farm, in arguing that courts should not look exclusively to the maximum penalties hypothetically available but should consider the penalties that realistically might be imposed, is asking for "precise advance notice of likely punishments." Resp. Br. at 26. The relevant constitutional issue is one of "fair notice," *BMW*, 517 U.S. at 574, not "precise advance notice." *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70 (1st Cir. 2001), which plaintiffs rely upon, does not support the punitive award in this case. In *Zimmerman*, the statutory penalties for comparable conduct included treble damages for age discrimination and uncapped damages for other types of discrimination. 262 F.3d at 83. Accordingly, the court concluded that the defendant had "sufficient notice" of a $400,000 punitive award that was in a two to one ratio to the compensatory award. *Id.* at 82-84. State Farm, in contrast, had no fair notice of the possibility of a $145 million punitive award for a single instance of failing to settle within policy limits. The Utah Supreme Court's misapplication of the third *BMW* guidepost warrants reversal of the punitive award by this Court.

III. State Farm Fully Preserved Its Constitutional Arguments in the Utah Courts

Plaintiffs contend that State Farm did not preserve its constitutional arguments against the imposition of punitive damages based on out-of-state and dissimilar conduct and that "its objections, to the extent it made any at all, were strictly limited to Utah law." *See* Resp. Br. at 9; *see also id.* at 4, 36, 41. Plaintiffs' waiver arguments are based upon misleading and incorrect characterizations of the proceedings below.[10] For example, plaintiffs' discussion of State Farm's pretrial motions to exclude evidence is carefully restricted to the 31 *written* motions or briefs filed with the trial court. *See id.* at 4. Entirely omitted from plaintiffs' discussion is the fact that when this Court's decision in *BMW* was issued shortly before the trial of the punitive damages phase of this case, State Farm's counsel immediately brought that decision to the trial court's attention and orally renewed State Farm's motions to exclude evidence of dissimilar and out-of-state conduct on the grounds that introduction of such evidence was constitutionally impermissible under *BMW*. After a hearing, at which State Farm's counsel fully argued the constitutional issues raised under *BMW* by the introduction of such evidence (Pet. 168a-172a, 185a-188a), the trial court denied State Farm's motions. Pet. 189a, 194a. After its ruling, the court plainly stated that it would consider *BMW* issues on a motion for remittitur, should remittitur become an issue. Pet. 189a-190a.

Under Utah practice, it is settled that where a trial judge denies a party's pretrial motion to exclude evidence, the party need not object at trial to preserve the issue for appeal. *See, e.g., City of Hildale v. Cooke*, 28 P.3d 697, 702 (Utah 2001); *State v. Saunders*, 992 P.2d 951, 958-60 (Utah 1999). Moreover, after the jury's rendition of the $145 million punitive award, State Farm moved in the trial court for remittitur and argued in its post-trial briefing and oral arguments that the award was unconstitutionally excessive because it punished out-of-state and dissimilar conduct and contravened the *BMW*

[10] Plaintiffs raised similar waiver arguments in their opposition to State Farm's petition for certiorari. For a more detailed discussion as to how State Farm preserved its constitutional arguments below, see Point I of State Farm's reply brief in support of its petition.

guideposts.[11] R.7758-63, 7965-74, 7985-89, 8772-76, 8794-8804, 9347-54, 9360-72, 10293:197-221, 269-76; L.431-36, 443-57, 465-80, 644-64, 886-910, 958-65.

Subsequently, in its opening brief on appeal to the Utah Supreme Court, State Farm set forth its constitutional arguments in a section headed "THE PUNITIVE DAMAGES AWARD IS EXCESSIVE." Appellant's ("App.") Br. at 71; L.749. Citing *BMW*, State Farm presented its extraterritoriality argument in a subsection entitled "It is unconstitutional to punish State Farm for conduct directed at insureds outside of Utah." App. Br. at 72; L.750. In other subsections, State Farm argued that, as a matter of due process, State Farm's conduct toward the Campbells, not its myriad alleged conduct toward other insureds, was the only legitimate basis for a punitive award. *See* App. Br. at 75-89; L.753-67. State Farm made this argument clear by the very titles of its subsections. *See* App. Br. at 72 (L.750) ("The Punitive Award Here Must Be Limited to Punishing State Farm For Its Conduct Toward the Campbells"); App. Br. at 75 (L.753) ("A $25 Million Punitive Award For An Isolated Act of Third-Party Bad Faith Is Excessive Under . . . The Due Process Clause Of The Fourteenth Amendment To The United States Constitution").

State Farm also preserved these issues in replying to plaintiffs' cross appeal to the Utah Supreme Court of the trial court's remittitur of the punitive award from $145 million to

[11] A post-trial motion for remittitur is the proper time and manner to raise an argument that a punitive award is unconstitutionally excessive including on grounds of extraterritoriality. *See Pulla v. Amoco Oil Co.*, 882 F. Supp. 836, 848-50 (S.D. Iowa 1994) (constitutional excessiveness challenge was properly raised in post-trial remittitur motion), *aff'd in part and rev'd in part*, 72 F.3d 648 (8th Cir. 1996) (reversing punitive award entirely). The trial court held post-trial that State Farm had waived its constitutional extraterritoriality argument only with respect to its JNOV/new trial motion. State Farm submits that the trial court's ruling was incorrect because State Farm had properly made objections to extraterritorial evidence in its *in limine* motion and argument and therefore did not need to object during trial to preserve the issues for appeal. *See City of Hildale*, 28 P.3d at 702. In any case, the trial court did not find that State Farm had waived the *BMW* extraterritoriality argument with respect to remittitur. Indeed, at the *in limine* hearing, the trial court specifically assured State Farm that it would consider that argument on a later motion for remittitur. Pet. 189a-190a.

$25 million. State Farm argued that its dissimilar conduct toward other insureds could not constitutionally be the basis for punitive damages. *See* App. Reply Br. at 38-39; L.773-74. State Farm also reiterated its due process argument that punitive damages "may not be justified as punishment for conduct directed at insureds outside of Utah." App. Reply Br. at 35; L.770.[12] In addition, State Farm raised its constitutional arguments against punishment of out-of-state and dissimilar conduct in its Petition for Rehearing (at 13-16, 18-23), which the Utah Supreme Court denied.

In sum, contrary to plaintiffs' contentions, State Farm fully preserved its objections to the constitutional errors involved in the imposition of punitive damages for out-of-state and dissimilar conduct. These constitutional errors, as well as the constitutional errors in the Utah courts' misapplication of the three *BMW* guideposts, require reversal of the punitive award.

CONCLUSION

The Utah Supreme Court's reinstatement of the $145 million punitive damages award should be reversed and the case remanded for a new trial as to punitive damages. If a new trial is not ordered, then, at least, a massive remittitur of the punitive award to an amount comporting with constitutional requirements would be warranted.

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[12] Under this Court's rule, the fact that the Utah Supreme Court did not explicitly rule on State Farm's due process extraterritorial argument does not bar the Court's review of that issue. *See Illinois v. Gates*, 462 U.S. 213, 218-19 & n.1 (1983); *see also Douglas v. Alabama*, 380 U.S. 415, 422 (1965) (whether federal constitutional errors are preserved for review by this Court "is itself a federal question"). Contrary to plaintiffs' contention (Resp. Br. at 36 n.24), State Farm's statement in its reply brief before the Utah Supreme Court that the extraterritoriality issue "hardly seem[ed] relevant" was *not* a waiver of that argument, but part of a sentence pointing out that plaintiffs in their cross-appeal appeared to have conceded that they could not rely "on non-Utah conduct to justify the $145 million award." Appellant's Reply Br. at 37 n.39; L.772. Plaintiffs' assertions in their briefs before the Utah Supreme Court that State Farm had waived or abandoned its constitutional extraterritoriality argument were confined to two footnotes (one in the evidentiary section of their 99 page opening brief and the other in their 51 page reply brief (Appellees' Br. at 37 n.24; Appellees' Reply Br. at 31 n.19)). Plaintiffs' footnotes were insufficient to preserve their waiver arguments. *See U.S. West Comm., Inc. v. Public Serv. Comm'n*, 901 P.2d 270, 278 (Utah 1995).

Respectfully Submitted,

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